OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Equalities, Human Rights and Civil Justice Committee

Tuesday 20 May 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 May 2025

CONTENTS

	Col.
CIVIL LEGAL AID INQUIRY	1

EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
13th Meeting 2025, Session 6

CONVENER

*Karen Adam (Banffshire and Buchan Coast) (SNP)

DEPUTY CONVENER

Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Pam Gosal (West Scotland) (Con)
*Marie McNair (Clydebank and Milngavie) (SNP)
Paul O'Kane (West Scotland) (Lab)
*Evelyn Tweed (Stirling) (SNP)
*Tess White (North East Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Katie Boyle (University of Strathclyde)
Dr Ben Christman (Environmental Rights Centre for Scotland)
Megan Farr (Children and Young People's Commissioner Scotland)
Kevin Kane (Shared Parenting Scotland)
Fiona McPhail (University of Glasgow)
Dr Marsha Scott (Scottish Women's Aid)
Dr Sabir Zazai OBE FRSE (Scottish Refugee Council)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 20 May 2025

[The Convener opened the meeting at 09:30]

Civil Legal Aid Inquiry

The Convener (Karen Adam): Good morning, and welcome to the 13th meeting in 2025 of the Equalities, Human Rights and Civil Justice Committee. We have received apologies from Maggie Chapman and Paul O'Kane.

Our first agenda item is to continue evidence taking on our civil legal aid inquiry. The committee will be exploring what is working and what is not working in the current civil legal aid system and what changes could be made in the shorter and longer term to address issues about access to civil legal aid.

I refer members to papers 1 and 2, and I welcome the first of our two panels of witnesses this morning. Kevin Kane is the chief executive of Shared Parenting Scotland; Fiona McPhail is a lecturer in social justice at the University of Glasgow; Dr Marsha Scott is chief executive of Scottish Women's Aid; and Sabir Zazai is chief executive of the Scottish Refugee Council. You are all very welcome.

We will move straight to questions, and I will kick off. Last week, we heard from witnesses about the general barriers to accessing civil legal assistance. I will ask each of you, in turn, the same question. What specific clients do you represent and what specific barriers do you see to their accessing civil legal aid assistance?

Kevin Kane (Shared Parenting Scotland): We support mothers, fathers and grandparents after separation or divorce. We are seeing increasing demand on our services. Almost all those people are affected by access to lawyers and legal aid. In particular, we are seeing more parents who feel that they have a case to argue but cannot find a solicitor to argue it. We have received calls from parents and grandparents in every part of Scotland, saying that they have phoned or emailed 50 to 60 solicitors without success.

We see an overarching barrier in our casework: the adversarial system, which creates an inequality of arms that can affect the outcome of proceedings. What I mean by that is that the better-resourced client can wear down the other until they have run out of money. Their choice is then to become a party litigant or to walk away.

Our view is that most people do not actually want legal aid; they want to solve their problems and get out of court. However, as things stand, that often requires going to court, at which point legal aid kicks in—for some. It is part of the solution, but it is also part of the problem, because it is bound to that escalatory, adversarial conveyor belt that people are then on.

Every one of our meetings round the country has pro bono solicitors. That is a positive, but it represents a fallout in the wider system. We are seeing an increasing number of referrals from other agencies, including agencies represented round this table: Aberlour and Children First at the local level in particular, and Scottish Women's Aid.

Much was said last week on the subject of finding a solicitor, and we would echo the comments on getting a solicitor to take legal aid cases. An emerging and growing issue for us concerns clients who leave one solicitor and are unable to find a new solicitor to take on an existing case.

Much has been said about the rural dimension, which we might pick up later. We have seen a more general attrition over five years, which is due to solicitors having died, retired or moved from one firm that did legal aid to another firm that does not.

I will pause there, as that is probably enough for now. There are things that we could say about funding, but I will allow others to come in.

Fiona McPhail (University of Glasgow): Good morning, convener and committee. Thank you for the opportunity to be here this morning. I am no longer in practice, but I have recently come from practice, having spent more than 10 years there. I hope that the evidence that I can share is of interest to the committee.

There are several barriers for those who are facing housing crisis, which I will go on to talk about. However, I want to start by making the point that housing crises and legal and housing issues can vary. The issue is not just about evictions, mortgage repossessions and homelessness; we are also talking about a good number of people who are stuck in damp housing or people who have a need for legal advice regarding security of tenure, and there are also queries concerning discrimination in the context of housing. The stark reality is that the majority of such cases, which are not deemed to be as urgent as cases with clients who are facing eviction, mortgage repossession or homelessness, are placed on the back burner.

Last week, the committee heard that there is a lack of provision, which is my starting point with regard to barriers. There is a huge shortage of housing lawyers who are able to advise and represent tenants, home owners, homeless people

and people who are in housing crisis. Those who are not in the priority category of facing an eviction hearing or being on the streets are much further away from getting through the doors to access the specialist legal advice that they need. Housing law is a varied area of law.

My second point is that, although the committee is concerned with access to civil legal aid, that is just one part of the bigger picture of accessing justice. Access to justice does not mean much if there are not any legally enforceable rights and if people do not know about their rights.

Scotland can be proud of its strong legislation for the homeless and for tenants across the social and private rented sectors. Law centres, charities and non-governmental organisations have done a great deal of work in campaigning for law reform and raising awareness of rights. However, neither of those activities is typically funded by legal aid. Legal aid lawyers are, understandably, increasingly concerned with their casework, so the activities that are required in raising awareness and influencing law reform fall by the wayside.

As my successor at Shelter Scotland, Ms Mair, said in her evidence to the committee last week, the primary barrier is the lack of provision of civil legal aid. In its response to this inquiry, the Scottish Legal Aid Board highlighted the

"lack of system wide data"

as a weakness of the present system, which makes it difficult to target interventions for those who are

"unable to secure legal representation."

I want to provide the following data. I am in an early stage of doing research, but we have data from the Scottish Courts and Tribunals Service and the First-tier Tribunal for Scotland housing and property chamber. That data shows us that the rate of social landlord evictions is increasing: in the past year, there has been a 21 per cent increase in the number of social rented sector evictions. There has been a 29 per cent increase in the number of mortgage repossessions, which are back to pre-pandemic levels. There was an 80 per cent increase in the number of cases from the private rented sector before the First-tier Tribunal in a 12-month period—that is from the annual report for 2022-23. The number of applications that were made to the tribunal for eviction in that year was a 29 per cent increase on pre-pandemic levels.

The statistics also tell us that the landlord is legally represented in 99.6 per cent of social rented eviction actions that are initiated, which can be contrasted with a figure of 9.6 per cent for defended actions in which the tenant is legally represented. For mortgage repossessions, the lender is represented in 99.9 per cent of actions that are initiated, whereas the debtor is represented in around 9 per cent of defended actions. The housing and property chamber tells us that, in 2021-22—again, an earlier year—60 per cent of landlord applications for eviction had representation, compared to 7 per cent for tenants.

I should stress that it is not necessary to have legal representation before the tribunal. However, even if we allow for a margin of error, the disparity in all three types of cases should raise alarm bells in the context of equality of arms, as has already been stated. In all those cases, at least one person—there will often be more—is at risk of losing their home. That is of great concern in the context of a housing emergency, when our local authority homeless services are at risk of systematic failure.

In 2017, the Law Society of Scotland conducted research on the social return on investment in legal aid and found that, for every £1 of legal aid that was spent on a housing case, there was an approximately £11 saving to the public. Part of that was about keeping people away from homeless services.

I will wrap up with the following points. We often look at England in fear, and there are, no doubt, grave concerns about the reform of legal aid south of the border. However, despite the stress on public finances in England, the Legal Aid Agency, in 2023, launched its housing loss prevention advice service, which offers in-court duty on-the-day emergency advice and advocacy to anyone who is facing possession proceedings. The service is not means-tested.

In Scotland, those who are at risk of eviction have to go through the means test as well as the merits test. I might say more later on grant funding in specific detail. However, lack of provision has to be the primary concern. We can look at why there are not enough housing lawyers—I will happily elaborate on that point in due course, if time permits—but, at this point, it is the shortage that is of greatest concern.

Dr Marsha Scott (Scottish Women's Aid): Good morning, everybody—it is good to see you all.

I was looking back at my notes for previous sessions, and making notes for this session, and I realised that I have been in this building and talked about this issue many times; the first time was in 2017. I preface my remarks, therefore, with the plea that there is an appetite for action. There is overwhelming evidence from my colleagues on the panel today and from colleagues on last week's panel, and we have submitted evidence multiple times to multiple committees over the past eight

years. It is clear that there are some tools available for quick action, but—as you probably all know—the whole system needs reform. However, we are no closer to that reform now than we were eight years ago, and I am deeply concerned about that.

I am from Scottish Women's Aid: we are Scotland's national domestic abuse organisation, and we have as our constituency women and children who are living with and experiencing domestic abuse in Scotland. That sounds like a bit of a niche crowd, but actually we are the bread and butter of the justice system in Scotland. We are the most likely reason for the police to be involved—the cases of domestic abuse on which the police follow up make up 25 to 30 per cent of police business, and 25 to 30 per cent or more of court business. It is not a niche population, and it absolutely crosses over with all the folks who are at risk of homelessness or who are made homeless by domestic abuse and by a system that fails to support them until they are destitute.

As a colleague has said about the policy, promoted by Westminster, of no recourse to public funds, it is "destitution by design". When we have a legal aid system that has in place the most farcical means-testing mechanism, and when we know that 95 per cent plus of the women who are experiencing domestic abuse and who need help are also experiencing financial and economic abuse, one has to wonder how sincere our attempts are not only to keep women safe in the context of domestic abuse, but to preserve their options so that they do not wind up destitute just through trying to protect themselves and their children.

Those are my overarching comments. With regard to the problems that we see, provision is a big problem. We have talked quite a bit about the desert of legal aid services—the situation is particularly acute in the Highlands and in island communities, but it can be found everywhere. We have brought people to the Parliament to talk to ministers, and we have done a number of things to try to ensure that people understand how desperate the situation is.

The underlying problem that we have in this argument, however, is that, even if there were enough legal aid lawyers, and if they were paid whatever it is that everybody agrees that they should be paid, the model for legal aid in Scotland is not fit for purpose for domestic abuse. It chops women's and children's lives up into little bits. It helps some and it does not help others. Our experience is that, as well as legal aid lawyers not being available, although it is a demand-led system for some people, it is certainly not demand led for the women and children who we support. That is probably the biggest violation of their human right to access to justice that I can think of.

09:45

The problem is that legal aid is not fit for purpose when it is available, which is so rarely. We have had Women's Aid workers in Grampian make 50 or 60 calls trying to find a solicitor. When I did it, I gave up on finding a legal aid solicitor and was just trying to find any solicitor. We have been working with SLAB, which has been very helpful and has set up a referral assistance programme, since it knows lawyers—go figure—to help to connect women who are eligible for legal aid with a lawyer. Usually, that will be a private solicitor. That has been successful for about 60 per cent of the calls that it gets where the folk are eligible. However, that number drops like a stone in communities in the islands and in rural areas, as something like six out of the seven firms that the programme refers to are based in Glasgow. You can imagine how good that representation is when people do get it.

There is a lack of solicitors and a lack of access to them, and means testing is a farce in the context of domestic abuse. It is probably a violation of human rights. The barriers are not only in quantity and access but in the quality of the design. The system is not designed appropriately for domestic abuse. We have developed and tested a different model, and the Government is now funding it. I hope that I will have an opportunity to talk about that.

Dr Sabir Zazai OBE FRSE (Scottish Refugee Council): Legal aid is not only a service but an important lifeline for those seeking protection in the United Kingdom and in Scotland. Refugees are navigating a very complex and inhumane asylum process, which is often in a language that they do not speak or understand, and which contains very complex legal language that most of us with a good command of English would struggle to get around. Access to quality legal representation can make the difference between justice and injustice. Today, I bring to you evidence that is based not only on numbers but on real people who have hopes and aspirations and who are looking to be part of our society and have access to everything that it has to offer.

The Scottish Refugee Council's position is that funding for legal aid assistance should be provided to not only lawyers but a wider network of organisations to allow them to provide second-tier support. The people who are arriving do not come from backgrounds or societies with established legal frameworks. Therefore, for some people, getting to know the complexity of the asylum system will be the first part of the process. People do not know that they have to submit their claim

through a lawyer, and they do not come here with a strong knowledge of the UK asylum system or its legal system, so quite a bit of initial preparatory work needs to be done before somebody engages with a lawyer.

The challenges faced by the Scottish Refugee Council in our work are not dissimilar to those that colleagues have already shared. There is very much a focus on the central belt, and there are issues about access to legal support and the quality and consistency of the support that is available to people at various stages.

The system does not take a trauma-informed approach. People arrive in a strange new world having experienced conflict, a perilous journey and separation from their families, so a trauma-informed approach is very important. Asking someone who has had that terrible experience to join a call with a person called a lawyer online or on the phone does not make legal support accessible. That can be retraumatising for some people, because it is the lawyer's role to ask why the person is submitting a claim for asylum in the UK. People might have to describe some terrible experiences on a call on a phone or computer. It is all important that people can speak to a human being who can listen to them and take note of their case and some of their evidence.

There are many complex cases of people whose rights to appeal have been exhausted. Those cases are also a priority. Unless a fresh claim is submitted or a lawyer is available who can take on their claim, they will continue to live in destitution and poverty while trying to rebuild their life. People are moving from war into poverty and longer-term destitution. There are delays with finding a lawyer, as demand outstrips supply. We hear that on our helplines at the Scottish Refugee Council. Some people have even approached me, as the chief executive, to say, "I have been waiting for two months for a lawyer to speak with me about a family reunion application"—and they are in Glasgow. It is not only those outside the central belt who are waiting to speak to a lawyer; there is pressure on demand in the central belt.

Language continues to be a barrier. Some of the letters that relate to asylum claims are very complex to understand, even for lawyers. People might receive a letter through the post or by email but not have access to a lawyer immediately to help them to understand the deadline for submission of fresh evidence or other evidence. The lack of availability of lawyers can mean that people miss important deadlines.

Another point, which I can elaborate on later, is about the importance of representation before people have their substantive interview. The evidence involved in that is very important. Given the UK's speeded-up asylum process, some people miss out on the opportunity to provide vital evidence to go with their claim before their substantive interview. In most cases, if the interview takes place and the person has not provided evidence to strengthen their claim for asylum, they are refused, which puts additional pressure on the system and the individuals, as fresh claims must then be submitted with additional evidence. Ultimately, those people are looking simply to rebuild their lives, be part of our society and start contributing to it but, sadly, the legal system puts them at a disadvantage.

The Convener: Thank you. I note, very politely, that we are almost halfway through our session and only one question has been asked. Therefore, I must ask that we be as succinct as possible. However, I recognise that this is an important subject, and there is a lot that witnesses would like to say.

We have heard that rurality has an impact and can create an additional barrier to access to justice. Would anyone like to discuss that?

Kevin Kane: I will keep it succinct, convener. We have been using the phrase "legal aid deserts" since the Evans review in 2018 to denote the issues with the availability of solicitors in the Highlands and in Aberdeenshire. At the time, we made the point that the private structure of the profession meant that the aspiration to have legal aid available in every part of the country was becoming unachievable. We were aware of cases that mirror the situation that Marsha Scott has described in the Highlands and in island communities. In one particular case, there was literally a race between separated parents to get in touch with the one and only solicitor.

Some of those issues were masked during the Covid-19 pandemic and the introduction of online hearings, as it meant that some of the central belt firms could pick up some of the slack. However, the return to what has been called "normality" has been brutal for the people whom we support. We have seen that what was once a question about rurality is now permeating the whole system, so transformative, legislative rule changes in the short term need to happen soon.

Dr Scott: I will be as quick as I can. We hear from managers across rural and island communities all the time about exactly the problem that has just been highlighted. In the context of domestic abuse, if a firm is representing the accused, it cannot take the woman's case. It is exactly as Kevin Kane described: there is a race to the one solicitor in the area.

Many of the solicitors, as I have said, will take parts of the case, but they cannot meet all the legal needs that the woman has. By the time she winds up with a solicitor, it is usually some time

later. In a case that I heard about last year from somebody in Shetland, the lawyer was based in Glasgow and had taken so many cases remotely that he was mixing up his clients and talking about another client's experiences in court.

It is a desert, but it is more than that. It is a desert all over Scotland in a lot of places, but folks are dying of thirst up in the more rural areas.

Dr Zazai: As I have said, I am going to bring in case studies and anecdotes from people who are in touch with us. On the lack of representation, we are working with someone who is living in an asylum hotel; there is also an age dispute, which highlights the complex nature of some of these cases. When cases involve not just an asylum claim, but an age dispute, an additional dimension is brought in. When that person was referred to the Scottish Refugee Council two months after his arrival, he was not linked with a solicitor, because he was not aware that a solicitor could help him challenge his case and also help with representation for his asylum claim.

He was due to attend a substantive interview, which is an important point in the process, without any preparation from a solicitor, and it meant that he was less prepared to answer any questions and did not know what to expect. In a sense, that type of case, if it went through the sped-up process, could end up placing an additional burden on the legal aid system. The case could be refused, and then a fresh claim would need to be made. Upstream intervention and early investment are very important, and there is a case to be made for investment in the sector beyond the legal sector, as the preparatory work is as important as the later stages.

The Convener: We have a supplementary from Tess White.

Tess White (North East Scotland) (Con): Dr Scott, you have talked about the model, so I will give you the opportunity to share your views with us, initially through a rural and remote lens.

Dr Scott: It will be hard to be quick, but I will do my best.

As I have said, we have known for a long time that the existing model is a problem. I have to say that there has been a fair amount of support from officials in the justice directorate in the Scottish Government, who are also concerned that the model is not fit for purpose. However, there was clearly no evidence that things were going to change—or change quickly. We talked to Martyn Evans, who had just finished the independent review, about his recommendation on funding advice agencies such as Scottish Women's Aid and the Scottish Refugee Council or removing the legal barriers for us to provide legal services directly. Those barriers are still in place, but I believe that the regulations are being rewritten to make that easier, which will be a good change.

10:00

Martyn put me in touch with the Legal Education Foundation. I am cutting out a lot of the history, but we got a grant to trial a model—this was during Covid, so you can imagine the complexities—that hosted a lawyer in Edinburgh Women's Aid, so, in essence, in a victim support organisation. Our test of the model was intended to demonstrate a number of things, which, in the evaluation, it did, and one of those things was that early intervention reduces court burden, trauma and the need for legal aid services. It is cheaper, too; we had qualitative and quantitative evidence that demonstrated as much in the first year of the pilot. The Legal Education Foundation paid for that work; the Scottish Government was convinced; and it has come through with funding for the project ever since. However, there have been unremitting difficulties with the bureaucracy of SLAB, which you are welcome to ask about.

With the support of the Legal Education Foundation, we have money to trial the model in Shetland and Orkney, because I am not convinced that a model based on the central belt default that is in Edinburgh will be fit for purpose for island and rural communities. A different design will probably be needed. We had an evidence-gathering session, funded by LEF; we designed a pilot project; and we got the money to run it for a year. However, we cannot find a solicitor. We pay a good salary—it is competitive—but, because it is a one-year post, it is not secure. Lots of lawyers are really interested in this area. Clearly, though, the system itself is so resistant to change that we cannot even attract a solicitor for a programme in which their salary is guaranteed. As I have said, the model reduces trauma; it is an early intervention; it reduces court burden; and it is cheap.

Tess White: On the issue of data, do you have figures for the number of women who are trying to access legal aid in rural areas following domestic abuse?

Dr Scott: SLAB will have some data, and we will also have data from our groups that has been gathered over multiple years. The most up-to-date data is probably from the referral assistance programme that SLAB set up, working with us, under which organisations around Scotland can call Women's Aid organisations and refer a woman to them. The programme has an annual report that sets out how many women were referred and how many women actually got a solicitor.

Tess White: What are the figures, roughly?

Dr Scott: I do not know the total numbers. Also, do not make the mistake of thinking that those numbers represent the unmet need. It is difficult even to get people to believe that SLAB will find them a solicitor any more, so it is hard to get people to refer women to SLAB, or, if someone has previously been knocked back—because, oh my god, they make £200 a week—they are never going to ask again, so the data on actual unmet need is not available.

Tess White: Our committee can try to pull some data from somewhere.

I have a final question about remote and rural areas. You touched on the thirst that is not being quenched in the desert, and the race in remote and rural areas for a solicitor. If I understand the issue correctly, the abuser is often first to get the solicitor. Are there any other challenges in that respect? You have talked about the number of solicitors who are coming to that position. Is that the only way to solve that huge issue?

Dr Scott: It is difficult, as you can imagine. The abuser has probably one or two tasks to manage and might have been convicted, so they have to manage the legal situation. The woman has to manage possibly being made homeless, having uprooted her children, and not having money coming in from the other source of income—if he was one. It is not too surprising that she might not be the first one at the solicitor's door. Even so, they should not have to race each other.

The other problem in rural areas, as you might well know, is that the sheriffs, the solicitors and the local system drivers all know each other, and it is difficult for women to feel that they will get a fair hearing in such an environment. That is why one solution could be a solicitor based in a victims organisation; the victim would get that support, and their lawyer would not have to provide it. The support would simply be there in the system—in, say, the Scottish Refugee Council. The lawyer would just be there to provide legal support, and it would make a huge difference to the quality of the outcome.

Pam Gosal (West Scotland) (Con): Good morning. Thank you for the information that you have provided so far.

We recently became aware of the case of a woman who was turned down not by one, not by two, but, shockingly, by 116 law firms that would not take up her divorce case. As you know, it takes a lot for a survivor, especially a woman, to come forward, let alone to seek legal aid. This woman was assaulted by her husband and had to find legal aid, and then was turned down, which added extra layers of stress.

However, that is not the only such case. Last week, we heard evidence from JustRight Scotland that people sometimes contact 30 to 50 law firms before their case gets picked up. Scottish Women's Aid has said that survivors of abuse sometimes face the challenge that local solicitors are representing the abuser, which leaves them having to find a solicitor in another part of the country, which makes things even more complicated.

I have spoken to many survivors of domestic abuse as part of my Prevention of Domestic Abuse (Scotland) Bill, and all I can say is that many of those women are extremely vulnerable. What should be done to make their lives a bit easier?

Dr Scott, you have already said that it is not only access and resources that are the problem—the model is also not fit—so it would be good to hear what more can be done. I know that you have already covered some of that.

Dr Scott: I agree with the evidence that was given last week that there are some quick fixes. On the eligibility requirements, I will probably not use the right term, but the means test—what is the other test called?

Fiona McPhail: The merit test.

Dr Scott: The merit test—thank you. I knew that there was a lawyer to my left.

Those are all designed to keep people out, rather than to get the folks who need access to justice in. It does not require primary legislation to change those things, and that would make a huge difference.

On making the system friendlier for lawyers, I have absolutely no appetite for getting involved in the controversy over legal aid prices, but I know that the system is cumbersome for everybody. Many changes could be made to how the current system is administered that would be quick wins for women and children experiencing domestic abuse.

I also think, as we have said repeatedly, that services should be free when domestic abuse is involved and the schedule of things that are covered should meet women's needs. I heard yesterday that, at the moment, a woman will be offered a solicitor, who may or may not help her in her child contact civil proceedings but will not help her in the division of the marital estate, with legal problems relating to housing and tenancy or with a host of other issues that are traumatising her over and over again.

There is a need for whole-system change, which would be relatively straightforward and quick to do. It will not fix the problem in the long term, because, when women do get a legal aid service, that is usually provided by someone who sees them for half an hour when it is clear from the work

of our service that the first interview should be for two hours in order to debrief a woman and get the best evidence.

The main reason why women call our legal services helpline—and this is also true for the Scottish Women's Rights Centre helpline—is to get help in civil processes around child contact. In Scotland, that is directly related to the gap between civil and criminal cases. I am not going to call this a quick fix because even I do not believe that it is that, but lots of other jurisdictions use a mechanism called an integrated court, where the same sheriff who has heard the criminal case hears the civil proceedings. I know that that does not seem to be related to the idea of legal aid, but it really reduces a woman's need for help from an additional solicitor, because the sheriff will have already heard all the details of the abuse, which greatly improves the evidence and decision making in civil cases.

There are a number of short-term fixes that would provide more access to a flawed service, along with a number of other things that could probably be done in the medium term, but it is really important to start now.

Pam Gosal: I have one more question. You said earlier that the model of legal aid for women and children in Scotland is not fit for purpose and is not demand led. Fiona McPhail spoke about the system in England, which is not means tested. Do you think that we should have such a system for domestic abuse cases here?

Dr Scott: Absolutely. I think the reference was to housing, because someone who is experiencing domestic abuse in England gets nothing.

How is it demand led, and how are you following Scottish policy in every other area connected to domestic abuse if you are means testing people who are subject to financial and economic abuse?

Pam Gosal: At times, the partner holds all the financial records and controls the finances. Women especially may not hold all the information and may have to be means tested.

Dr Scott: If she was not destitute going into the relationship, she will be by the time she comes out.

Pam Gosal: Does anybody want to add anything?

Dr Zazai: The system must treat people as people and families as families that can have breakdowns when people who live together face challenges. It is important to bear that in mind not only at the beginning of asylum claims but later on, too. We work with families that are resettled and do not have to submit an asylum claim, but there can be fearful moments even later on, either because of family breakdown or children ending up in care.

We worked with a mother who had a fear of authority, so speaking with a lawyer was not a solution for her because she thought that it would exacerbate things. We need to raise awareness that the legal system is here to help and support people, and that it is not only there for the male members of a family. In a majority of cases, because of culture, the men will be out there learning the language and the system and the women will only hit the system when things go wrong in the family.

A sped-up process is needed for complex cases—for example where there has been a family breakdown or children have ended up in care. A review of all the barriers to accessing legal aid is also needed, and we should take a holistic approach. It is compelling that people are having to call hundreds of times to get a lawyer and still cannot get one. There are other barriers as well, and if a review takes place it should take into account all the barriers that people face at various stages and the need for legal aid.

10:15

Pam Gosal: I have one more question for Dr Zazai about the cultural side of things, because that issue was raised last week.

You spoke about language barriers. Many women—because it is usually women—are left in a no-man's-land in cases of domestic abuse that involve housing. They do not have access to information and they cannot communicate. You said that sometimes it is hard to even read and interpret a solicitor's letter. Do you agree that there are not only language barriers but cultural ones?

In the evidence that we took last week on cultural barriers, we heard that sometimes—in fact most of the time—solicitors do not have the time or the resources to understand people's background or the cultural aspects of their situation. I know that when you speak with those from different backgrounds you are sometimes dealing with a whole family—sometimes a whole community—and not only with the person who has been domestically abused. What would you say about the fact that legal aid solicitors do not have training in culture or the resources to access that?

Dr Zazai: There could be a platform to share learning between the legal sector—immigration and asylum lawyers—and those of us in the third sector, because that unique learning has to be captured.

The cultural point is very important. In various cultures, a woman speaking to a lawyer against her husband is not good in terms of family values.

As a result, a lot of barriers are created that mean that a person might not engage with the legal system to access their rights. That might be for a variety of reasons—guilt trips and so on—and there is a role for the third sector and those who work with refugees, who could play a part by giving second-tier advice to people and therefore bring them closer to their rights. Our legal aid advice is available to everyone. Other services are available to everyone, but sadly, because of barriers including language, fear of authority and cultural issues, those in very complex and vulnerable situations might not be able to access them. We need to think about how we can all work together to remove the barriers.

There is a role for the third sector to work closely with the legal sector. People do not only need a lawyer; they need protection, support and safety to come out of a complex situation, whether that is because of their asylum claim, because their rights to appeal are exhausted or because of a family breakdown, which is a very complex issue.

Dr Scott: I have been remiss in speaking in general terms, but the most marginalized women—whether because of race, ethnicity, disability or morality—are the ones who are thrown away by the current system. First, you have to be a good victim. You have to be good at getting your lawyer, getting to the solicitor's office and representing yourself and you have to speak English and know all of the things that make a good victim, and you are still going to struggle to find a service.

The Convener: Tess White has a question.

Tess White: It has already been asked.

The Convener: Okay—thank you. I call Marie McNair.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning, witnesses. The Scottish Government made several reform proposals in its recent discussion paper on legal aid. One was to test different models of delivery. Some of you have already touched on the models but is there anything else that you want input?

Fiona McPhail, you spoke about grant funding. I would be interested to hear what you have to say on that.

Fiona McPhail: I was a recipient of grant funding when I was at Shelter Scotland. It plays a key role. I made reference to an in-court advice scheme in England—the grant funding model in Scotland goes some way to meeting that ambition but falls short of doing so. I encourage a review of grant funding, which is a part of legal aid expenditure that has decreased. If the committee is to make recommendations in respect of grant funding, it should encourage the Government to increase the amount of money there. We have heard about those programmes—they enable collaboration between the third sector and the legal profession, and go some way to meeting unmet legal needs.

Grant funding needs to be available beyond the 12-months term. I cannot stress that enough. If wish to be bold, make a dent and bring a new generation of legal aid lawyers in to the profession, we need to start looking at three to five-year grants. As well as increasing expenditure, let us also revisit the scope of grant funding. In the context of housing, in the project I managed, it was restricted to rent arrears. We can be much more ambitious.

Thankfully, some positive reforms are mentioned in the discussion paper. In the very short time I have, I stress that there are some quick fixes or small tweaks that can be made in a short timescale, which were provided not by only one or two respondents to the inquiry but by several of them.

If we are talking about access to justice in Scotland, we have reached a stage at which advice and assistance eligibility limits must be reviewed and revised upward. There has been a call for exempting certain categories of cases from means testing. In the current system, in the context of adults without incapacity, there is no means testing. Let us revisit that for other areas.

In a housing emergency, there should be no means testing if people are at risk of losing their house or of being turned away from local authority areas. I have acted for women fleeing domestic abuse, who have been told that there is not accommodation available—but for the involvement of a solicitor, that woman would have had to return to that abusive household or go somewhere else. Similarly for refugees—there is a huge overlap. My colleagues have spoken very well about the need for a trauma-informed approach. That is not funded in the current rates that legal aid pays.

We need to look the reforms that are on the table about advice and assistance, exemptions and grant funding, and to urge the increase in expenditure on grant funding and a three to five-year commitment.

I will leave it there—I am conscious that I may not have fully answered your question.

Kevin Kane: That summarises a lot about judicare grant funding and the possibilities for it. Our response on the broader question of access to justice and how to improve the system is to support a flexible system—that is the first thing.

The bigger vision and gold standard for us is a situation in which SLAB and other organisations

could refer people to alternatives to court. There are examples of that happening in pilot schemes in England, and other jurisdictions around the world do it already. That would prioritise relationship building, supporting children to see and get the best of both their parents where there is no risk to doing so. That would create opportunity for partners like us and the wider legal aid workforce to promote the holistic support that everybody has been driving at in their submissions today.

One of our biggest issues is that, in family court settings, sometimes there are disagreeable parents who are in an emotional space. The court will decide in the interests of the child, but often that child is forgotten. The case of those two sometimes disagreeable parents will be bound up with the cases of other parents for whom the struggle is real and there are domestic abuse issues. That is problematic.

We believe that if there was a bit of flexibility in the system, SLAB could adjust its set-up to allow that function to happen. In advance of any legislation, and certainly during the legislative process, we would want to involve our users so that we can create the holistic future that we all want. The current legislation involves a winner-takes-all attitude to parenting, and it is stuck in the 1970s and 1980s. We can do better.

Marie McNair: That was mentioned by the witnesses in last week's session as well.

I see that Marsha Scott wants to come in—that is no problem.

Dr Scott: I will be quick. We need to be very cautious about alternative dispute resolution, because we know that women are being pressured every day to go into mediation in the context of domestic abuse. It saves the system money, and it is very dangerous. However, that is for a whole other session.

On grant funding, that is, in a way, a bit of a quick fix in comparison with other options, as the decision can be made by the Government relatively quickly. However, we have seen difficulties. Women in Edinburgh had to go without a service for a year because the system moved so slowly. There had been internal approval from a minister, but the bureaucracy in SLAB is—well, I have sympathy even for the people who work in SLAB.

There has to be some mechanism for cutting through a lot of that, but we also need a much longer-term plan. Funding something for a year means that, the day after you fund it, you need to start planning for the next year. We had a year's funding in Edinburgh; there was then a year's hiatus, when women got no service; and then there was funding for two years, with which we were thrilled. However, we are approaching the end of that two-year funding and there has been no guarantee of extension, so we are desperately worried that the same scenario is going to repeat itself.

There needs to be a commitment to that funding as a problem-solving approach, but also as a stop-gap on the way to system reform, to which I think officials are really committed. There has to be a way to streamline the system to make it actually work for the user, rather than for the folks who are administrating it. A whole set of things could then be done to make that smoother.

Marie McNair: I very much agree with your comments there. Sabir, do you want to come in?

Dr Zazai: We need to bear in mind the context and the shifting landscape of asylum and refugees in Scotland. A total of 30 out of 32 Scottish local authorities now have either asylum or refugee resettlement schemes, so the need for a good-quality standard of legal advice across Scotland has now increased. That needs to be taken into account.

Previously, Glasgow used to be the asylum dispersal city, and that is why there is a strong focus there. We need to learn from Glasgow's example. The infrastructure in Glasgow has been developed over the past 20-odd years, with good-quality, consistent, accessible legal advice. That infrastructure needs to be built across Scotland, which requires a longer-term commitment from everyone. Again, going back to what colleagues have said, there needs to be an increase in the legal aid fee for lawyers so that it is an attractive area for them.

We need longer-term funding. For those of us in the third sector who might set up a legal project, for example, there needs to be a vision and a future for that in order for us to see what the impact is.

As I said earlier, we also need a platform to give people a better understanding of the system as they arrive. That is an opportunity for the third sector and the legal sector to work together. There also needs to be a review of all the barriers at all levels. Finally, we urge the Scottish Government to deliver on its commitment to introduce a legal aid reform bill. That would be a unique opportunity to shape the system through meaningful conversation with service users—the people who access legal aid—as well as with lawyers and third sector organisations.

I will leave it at that, convener.

10:30

The Convener: We are coming to the end of our session, so I ask members whether they are

satisfied that they have asked everything that they would like to ask.

I see that they are. I have one final question for the witnesses. Are there any other issues that you have not been asked about that you would like to raise before we close?

Dr Scott: I will be very quick. Considering that this is the Equalities, Human Rights and Civil Justice Committee, I think that it is worth pointing out that the United Nations Human Rights Committee has addressed these issues in reviewing states parties' human rights provisions and violations. In this case, the UK is the state party, but the UN's "Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland" document refers specifically to Scotland and Northern Ireland also. It states:

"the Committee is concerned about the depletion of legal aid lawyers"

in the state party, including

"in Northern Ireland and Scotland".

When the problem is so obvious that even the UN, which is pretty clueless about devolution, points out that there is a problem in Scotland, and there have been multiple findings across the International Covenant on Economic, Social and Cultural Rights and the reviews by the Human Rights Committees and a number of other mechanisms, it really is past time for the Scottish Government and the Scottish Parliament to act.

Kevin Kane: I will pick up on the point about the UN in just a second—I will be as quick as I can. We find ourselves in the curious position that we are helping individuals to understand and make the best of the current adversarial system, but we think that it has fallen behind the realities of parenting and the make-up of families in Scotland.

The public expects that their public services will be funded, responsive, user-led and accountable, and that we can meet the challenges of 2025. The UN Convention on the Rights of the Child has been incorporated into Scots law. That is a fantastic shift towards a rights-respecting family law system, and it gives us an opportunity, now that the term is in law, to think carefully about what we mean by "the best interests of the child"—how and when we communicate with them, and who communicates with them, in a contact and dispute situation. There is an article 9 right to "both parents". Legal aid is part of addressing the issue, but it is not all of it. I thank Marsha Scott for creating a segue into that point.

The Convener: Fiona, do you want to come in?

Fiona McPhail: Very briefly, because we have not really touched on retention and recruitment of legal aid lawyers. I am now working with students at university, and there is an appetite among them to go into areas of social welfare law. I think that the Scottish Legal Aid Board, in its submission, downplays the impact that legal aid has. There are no doubt issues across the profession with recruitment, but where the advice and assistance rate is £63.88 per hour, or grant funding is on a one-year cycle, the system—this point has not been touched on in this week's session, but it was made by colleagues last week—does not trust the profession. Solicitors in legal aid practice spend a great deal of time justifying every step in the process, notwithstanding the urgency of the matter or the vulnerability of the client.

Those three factors make it very difficult to encourage a new generation of legal aid lawyers to come into the fold, despite the need and the demand that exists in the context of housing. It is a hugely interesting and rewarding area of work, and I want there to be a future generation of housing lawyers to provide assistance, but there will need to be legal aid reform in the imminent future.

Dr Zazai: I briefly want to bring to the committee's attention the issue of the gap in legal aid provision when people are forced to leave Scotland. With the UK Government's commitment to processing hubs outside the UK, people might face a situation where they are detained and taken to England to be deported from the UK. Last year, we had a case in which someone was detained in a centre in England and they could not access their lawyer in Scotland because they were no longer here.

Solicitors are often keen to continue to represent their clients, but the lack of continuity in the system prevents that. That could be an issue in the future where people are facing the grim prospect of deportation but their lawyers are in Scotland. Can those lawyers practice and defend those people's rights when they are moved into a different legal system in England?

The Convener: Thank you. That brings our first session to a close, and I suspend the meeting briefly while we change over witnesses.

10:35

Meeting suspended.

10:43

On resuming—

The Convener: We welcome our second panel of witnesses. Professor Katie Boyle is chair of human rights law and social justice at the University of Strathclyde school of law, and Dr Ben Christman is legal director at the Environmental

Rights Centre for Scotland. Thank you for attending today.

We will go straight into questions, and I will kick us off. Will you explain the accessible, affordable, timely and effective framework and the role that access to justice plays in supporting action on human rights breaches?

Professor Katie Boyle (University of Strathclyde): Thank you very much for the invitation to join you today. I will speak about the right to an effective remedy, which is the framework that you just mentioned, and I will do so on the basis of previous research that I have done.

The Nuffield Foundation funds, on a competitive basis, independent academic research. It funded me and my team of researchers to look at access to justice for social rights across the UK. We looked at all the different jurisdictions, and we have a sense of how Scotland fares in comparison with other jurisdictions. We used the international human rights framework to guide us, and we used the right to an effective remedy as the standard that we were assessing compliance with. That includes the point that access to justice should be accessible, affordable, timely and effective. Interestingly, when we unpack that framework, we find that all those terms mean different things to different people.

10:45

We have a lot of helpful commentary on what an effective remedy is, which includes UN guidance. We undertook empirical research with practitioners across all advice tiers—from food bank advice to solicitors, advocates and barristers—to try to understand how they understood it. Interestingly, those in the legal profession often think of effective remedies as being about equal access to effective processes. They think of a remedy as being a judicial review, access to a tribunal or having something determined by the Scottish Public Services Ombudsman, for example.

However, people, as well as the UN framework and international law, say that not only do people need equal access to processes that are accessible, timely and affordable; they also need remedies that lead to an effective outcome. Whatever route to remedy someone takes, it must result in justice being delivered. That does not mean that everybody needs to win all cases, but the route that someone uses needs to be capable of delivering justice.

It is very problematic that we have not calibrated our civil justice system in the UK in a way that delivers accessible, timely, affordable or effective processes or outcomes. There are many different reasons for that, some of which are just about historical background. Ultimately, legal aid, including civil legal aid, is an absolutely crucial cog in a much bigger wheel—the whole of access to justice and the civil justice system. Legal aid should be understood as part of a broader framework, which is like a complex jigsaw, and all the different bodies need to play their part in order to make the system work. At the moment, the civil legal aid system is not operating to help deliver on that or to deliver on the outcomes that are needed. That cuts across social rights issues.

I focus specifically on fuel, housing, social security and an adequate standard of living and housing. We saw that, across all those areas, justice has not delivered for people. There are two really important reasons why that is the case. First, if we think about it from the perspective of somebody's life, those issues are interconnected, but our justice system fragments them into separate issues, so they all have separate routes to remedy.

Secondly, those issues are often systemic in nature, which means that they apply to many people at the same time. A social security issue or problem will apply to many people. It is the same with housing, damp and mould, habitability and evictions. Those issues are normally systemic in nature, and the legal aid system does not deliver clustered justice funding or systemic and structural funding, which is what is expected of an effective remedy in international law.

Dr Ben Christman (Environmental Rights Centre for Scotland): Good morning, and thanks for providing us with the opportunity to give evidence today and for investigating this important topic.

I do not have a huge amount to say in response to the question, but, on the role that access to justice plays in challenging human rights breaches, my organisation focuses on the right to a healthy environment. In international law terms, it is well recognised that there is a human right to live in a clean and healthy environment and that the enjoyment of that right underpins the enjoyment of most other human rights.

Breaches of the right to a healthy environment often come about as a result of breaches of environmental laws. In the absence of access to justice, it is very difficult to challenge breaches of environmental laws. That explains the importance of access to justice and challenging human rights breaches in the context of my organisation.

Tess White: Professor Boyle, I found it really interesting when you talked about fragmentation and systemic issues. For example, groups such as For Women Scotland are increasingly using crowdfunding to fund challenges to the Scottish Government's interpretation and implementation of the law. Crowdfunding is becoming a powerful tool

to shape change, but it is not always an option for individuals, community groups and other organisations. What role does civil legal assistance play in supporting access to justice in such situations? Could it have an expanded role?

Professor Boyle: I think that your question relates to the operation of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which makes it very difficult to raise public interest litigation using legal aid. I am sure that regulation 15 has performed a very important role historically in trying to manage the cases that can come before the court and in trying to stem the flow of what might be deemed as vexatious claims or a litigation-type culture. However, regulation 15 and the way that it operates need to be balanced with an understanding of more current research, which tells us about the issues that legal aid ought to support, which is covering people who are experiencing socioeconomic deprivation. That is our main demographic for legal aid.

We cannot use legal aid in ways that allow public interest litigation or facilitate group proceedings when it is not clear to the Scottish Legal Aid Board whether someone else could effectively have paid for that case.

There are several problems with regulation 15. First, the wording of it is not entirely clear, which I think will in itself have a chilling effect. It is perhaps as a result of regulation 15 having a chilling effect on public interest and group proceedings that there are not many applications for legal aid. A solicitor working in that area who looked at the regulation might say, "That's probably not going to fly."

The problem is not unique to Scotland. The problem with relying on funding public interest cases through group funding is that an uneven distribution of issues will come before the court. It is for the court, the Parliament and the Government to regulate what types of cases come before the courts, and they do that using standing. Following the AXA ruling, we have had broader standing in Scotland to bring cases.

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 specifically makes it clear that there should be wider tests. The reason that we have public interest litigation and group proceedings is to try to relieve the burden on the individual.

We spoke to practitioners across the UK and they consistently told us that, in all the areas relating to poverty, all the issues—concerning people not being able to feed their children or heat their homes, homes having mould or damp, in-work poverty and social security benefits not helping to address the cost of living crisis—were ultimately systemic in nature. We do not see those types of cases, but we know that we need to have a more collective response to such issues.

Regulation 15 of the 2002 regulations performs that role of preventing civil legal aid from stepping in with a collective response. There must be a better way to balance that.

SLAB—and, I understand, the Scottish Government—gave you evidence in the past to the effect that things are not working in practice. Any economic, social, cultural or environmental issues will be systemic in nature by virtue of the fact that they tend to apply to lots of people and regulation 15 prevents us from suggesting both public interest litigation and group proceedings via legal aid.

SLAB has a reasonableness test about the merits of a case. There is room to clarify the wording of regulation 15 to strike a better balance of cases that are needed in relation to group proceedings or public interest litigation, which tend to be about the issue itself, not the person. Legal aid should not always be tied to an individual. First, that is to prevent that individual taking on the burden for everybody else, which is a completely unfair expectation to place on someone. Also, it will not always be clear that only one person is impacted, because it is a collective issue. We need clarity on that.

Secondly, SLAB could improve its guidance on the reasonableness test to say that, if the case is going to address a wider public interest point and it will affect many people if it funds the case, the practical benefits of that and the benefits for society make funding it worth while. Changes to the rules in Northern Ireland have done that—they have expanded the reasonableness test—and that does not require any legislation. However, I understand why SLAB would be concerned about taking that step until regulation 15 has been clarified, so it is really important that that happens.

Tess White: That is helpful. Thank you.

Evelyn Tweed (Stirling) (SNP): I will follow on from that. What would the benefits be of group actions?

Professor Boyle: There is research on group actions. There are three ways of addressing an issue that is of wide public importance. The one that we have typically used is for an individual to raise the action on behalf of everyone else and then you test the case and sist all other cases. That is the way that it has operated in Scotland historically. However, the court itself realised that that was problematic, because different issues will arise with all the separate individuals and the court should really look at the matter as a whole. Therefore, it changed rule 2.2 of court procedures to enable multigroup actions. Subsequently, the Parliament said that it needed to clarify that on a

wider scale rather than relying on the court doing that on an ad hoc basis. That led to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which was followed by rules in 2020 to help with using that act.

The motivation behind the court's and the Parliament's actions were to remove the burden on the individual, because of the resilience that it takes for one person to fight a case. Ultimately, that person might be offered an out-of-court settlement, but for them then to be asked not to take that settlement because there will be a much better outcome if this case is fought for everybody is not a fair burden to place on them. They need not only the financial resources but the emotional resources that give them the resilience to do that. You come across really unusual situations in which there is an awareness of an issue but legal aid lawyers or law centres, such as the Child Poverty Action Group, are looking for the right person for the case, so the injustice remains unaddressed for however long that takes.

Therefore, there are many, many reasons why it would be helpful to have group proceedings. The worry is that you will open things up to big financial compensation claims. However, from a human rights and equality perspective, in terms of international law and the human rights framework that Scotland was trying to create in relation to the human rights bill and UNCRC incorporation, reparation is not just about damages; it is not always about financial compensation. Although that might be an important part of an effective remedy, from international comparative law, we have found that effective remedies tend to be an aggregate of remedies to fix the problem. People want an apology, they want the violation to stop happening and they want it to not happen to anybody else. That maps on to the international framework, which says that we need guarantees of non-repetition. The idea is that you fix the problem for everyone and the efficiency of the system improves overall.

At the moment, we have huge missing feedback loops. We do not have the data for the First-tier Tribunal for Scotland, but, if you look at the tribunals for social security and immigration and asylum cases, which are reserved areas of law, you will see that we are looking at unlawful decisions in 50 to 70 per cent of cases—50 per cent in relation to immigration and asylum cases and up to 70 per cent in relation to social security cases. We need to consider the waste in the system of that many decisions being overturned, when it could be fixed on a more collective basis.

International courts are responding to that situation. For example, the European Court of Human Rights has a pilot judgment system to fix things on a broader scale to address structural issues so that, instead of individuals waiting in line to raise issues of injustice that are collective in nature, it can say, "Look, can we fix this problem by actually changing the legislation so that the violation stops for everyone?" The problem is that idea of individualising injustice that is collective in nature, and group proceedings and public interest can help to remove the burden on the individual.

Evelyn Tweed: Would having both make for a much more efficient system?

11:00

Professor Boyle: Yes, absolutely. We do not know the degree to which there would be efficiencies in the system, but that is really important research that needs to happen. For example, the Scottish Legal Aid Board is often looking at things from an efficiency perspective, but what seems to be missing is an understanding of the fact that, if you were able to deal with things collectively, you could improve those efficiencies. Rather than having a double audit system that checks, for example, that solicitors are paying for things, we could have a system that was focused on addressing the collective issues that people face. It is almost a case of changing the aims and the structure to recalibrate it for a human rights and equality perspective. At the moment, we do not have that. That is a known problem for SLAB, because in 2021 it had enforcement under an agreement under section 23 of the Equality Act 2006 with the Equality and Human Rights Commission, which said that it was not happy with SLAB's equality and human rights impact.

Therefore, it is fair to say that there has been a learning journey and huge increases in the number of equality impact assessments that are being done. However, the data that SLAB is using is about its current clients. I would refer to them as human beings with human rights. SLAB is gathering that data from the clients it serves instead of understanding the broader societal issues. It is not gathering data to understand why healthy life expectancy has reduced for people in poorer areas and why people are dying younger in poorer areas.

People experience cross-cutting issues—interconnected clustered problems that are not being addressed and which the justice system cannot cope with. That data should be driving a service that is for people from socioeconomically deprived areas. In evidence, the Law Society of Scotland has explained that, out of the 139 most deprived areas in Scotland, 122 do not have a civil legal aid firm. This depth of unmet need and unmet human rights cannot continue.

Evelyn Tweed: Ben Christman, do you want to come in on that?

Dr Christman: Not specifically on that question, but I want to go back to Tess White's question and some of what Professor Boyle said about regulation 15. One of the main points that I want to make to the committee today is about the issues with regulation 15. Back in November, I gave evidence to the committee about the barriers that regulation 15 creates to accessing justice in environmental matters. After today, committee members will probably be so bored of regulation 15 that they will never want to hear about it again. However, I am going to go through it, so please bear with me.

Regulation 15 makes it really difficult to obtain legal aid in environmental cases, because it sets out the joint interest test. Professor Boyle has clearly articulated the problems with regulation 15 in relation to the lack of clarity, and people do not really understand exactly what it means. I am not sure that SLAB really understands what it means, so it is not particularly effective law to start with. There are two elements to regulation 15. It says that people who are applying for legal aid whose cases involve joint interests—environmental cases almost always involve joint interests, because protecting the environment is an inherently public interest issue—can be granted legal aid only if the Legal Aid Board is satisfied either that there is serious prejudice or that it would not be reasonable and proper for the other people who are jointly concerned in the case to pay the expenses that would otherwise be paid from legal aid.

Therefore, there are two elements to the test. The first is the serious prejudice side of things, which is regulation 15(a). It sets a really high bar for applicants. We do not really know what serious prejudice is, because it is not defined in the regulations or in the guidance. Environmental cases often involve diffuse public interests that do not have a severe detrimental impact on any one person, so it is quite difficult to say that any one person is seriously prejudiced in an environmental case, and the regulation is therefore particularly problematic in environmental cases.

The second limb of regulation 15, regulation 15(b), is about other people chipping in and paying the costs of the case. As well as the lack of clarity in the joint interest test, there are a number of practical difficulties with regulation 15(b). It assumes that you are somehow able to identify the other people who have a joint interest in the case with the person who is applying for legal aid. That is very difficult to do, particularly in a case that involves a national issue or a high-profile local issue. There might be tens, hundreds or possibly thousands of people with an interest in the case.

If you are able to identify those people, obtaining financial information from them will then be very difficult. If, somehow, you can get through the first two practical hurdles of identifying people with a joint interest and obtaining financial information from them, in a case in which someone who is applying for legal aid has identified those other parties with a joint interest who might be able to fund their case, there will probably be difficulties in establishing what sort of legal tactics to use if they are to club together and pool their resources. There may be differences such that the person who is applying for legal aid and the other person with a joint interest do not want to litigate together, in which case why should the resources of the other person with a joint interest be taken into account by the Legal Aid Board?

We propose changing that process by amending the 2002 regulations in a way that excludes from regulation 15 cases that fall within the scope of the Aarhus convention. In our written evidence to the committee, we have provided draft wording to amend the regulations in that way, and the Scottish Government has the power, under section 36 of the Legal Aid (Scotland) Act 1986, to amend those regulations. It is a relatively simple change that could be made just by amending the regulations. It would be a quick win that would not require primary legislation.

Tess White: I have a follow-up question for Dr Christman. You talk about the Aarhus convention, and I wonder whether that would apply to this case. As you are aware, the committee recently scrutinised the Aarhus convention and I raised the issue of the considerable barriers for community action groups in opposing new energy transmission infrastructure. There is rarely equality—there is huge inequality—for groups that want to challenge what they see as the environmental vandalism that they are experiencing. The Environmental Rights Centre for Scotland was of the view that the Scottish Government was in breach of the Aarhus convention. You have touched on regulation 15 of the 2002 regulations and access to justice on environmental issues. Could the quick fix that you are talking about relate to that issue?

Dr Christman: The issue of resolving problems with the Aarhus convention?

Tess White: Yes—in cases of huge environmental vandalism, when people feel completely disempowered. It is a David and Goliath situation, and there is nowhere for them to go for justice.

Dr Christman: It could. To take your example, we are talking about someone potentially challenging a decision to grant consent for energy infrastructure. If a person was concerned about the decision and wanted to apply for legal aid to challenge it, the chances are that they would be

caught by regulation 15 and would be unable to obtain legal aid because of that regulation. However, if our proposal to amend regulation 15 as we have suggested was to come into effect, they might have a chance of obtaining legal aid.

Marie McNair: Good morning. I will focus my questions on a recent discussion paper on legal aid in which the Scottish Government made a number of reform proposals. One of those was the proposal to test different models of delivery. Do you have any views on the advantages or disadvantages of the models, such as the grant funding model that I touched on in the previous session and the contracting of, or use of, solicitors who are directly employed by the Scottish Legal Aid Board?

Professor Boyle: There is probably room for more detail of how different models might operate. From the excellent evidence that has been given today and last week, including from practitioners themselves, it seems that the best thing to do would probably be to work with the people who use the system to design models that operate efficiently. For example, one-year grants are problematic. Equally, relying only on salaried lawyers who are paid via SLAB might not address all the issues around having sufficient solicitor numbers, advice deserts and having solicitors who specialise in different areas.

Having a legal aid-funded person seems like a good way to address the clustered nature of some of the issues. There is rich evidence of how, if you address issues and are as preventative as possible as early as possible, you can stop things from spiralling, because a lot of the issues are connected. The research suggests co-locating services, for example, and some excellent work has been done on that by Hazel Genn, Pascoe Pleasance and others. For decades, they have been looking at the idea of co-locating services where people use them. Even the number of different poverty banks that we have is connected to violations of human rights and social rights that, ultimately, should be addressed as unmet legal needs.

More could be done to engage with the profession about what would work best, and it would probably involve a multi-model version of all the different ways of working. For example, evidence from the Scottish Human Rights Commission on rural experience shows that the human rights needs that people have in rural settings are different to those in other settings. There needs to be a broad variety and an aggregate of models and, ideally, trust between the profession, SLAB and Government. Involving people with lived experience would be of huge benefit, because they, more than anyone, know what is needed to address the very clustered and interconnected nature of the problems that they face.

Marie McNair: Thank you. That is really helpful. Dr Christman, do you have anything to add?

Dr Christman: Yes. I will make a couple of comments on the discussion paper from the Scottish Government. Professor Boyle very diplomatically said that there is room for more detail in the paper on models of delivery. I will be less diplomatic. I think that it is vague, noncommittal and wholly unsatisfactory on that point—it is just some words, with absolutely no detail of what the Government is proposing.

On the paper more generally, although it is positive that some reforms to legal aid are outlined in it, they are very minor and do not really touch the sides when it comes to the general legal aid crisis, which the committee has heard evidence about. The committee might want to challenge the ministers a bit on that paper and on why the reforms that are proposed within it are so lacklustre and lacking.

Marie McNair: Thank you. I really appreciate your answer.

Pam Gosal: Good morning. I thank the witnesses for the information that they have provided so far. Last week, I brought up the issue of abusive partners controlling all the household finances. In many cases, the abused person, which is usually the woman, does not know the household annual income. Therefore, the victim risks their application for legal aid being turned down either because the household income is too high or because there is no clear indication of what the household income is.

Survivors of domestic abuse come from all walks of life and all socioeconomic backgrounds. Witnesses at last week's evidence session called for the removal of the criteria for accessing legal aid in certain cases, such as those brought by parties seeking civil protection orders and by survivors of domestic abuse. What changes need to happen to ensure that a human rights-based approach is taken to resolving legal disputes?

11:15

Dr Christman: I cannot provide evidence on domestic abuse cases, but I can do so on the need to reform the financial eligibility criteria for legal aid more broadly.

My organisation is part of the Scottish Association of Law Centres—SALC—which, last year, published a paper on the need to reform the financial eligibility thresholds for the type of legal aid called advice and assistance. As members will probably know, advice and assistance pays for solicitors to carry out, on behalf of clients, work

that does not involve litigation. It can involve reviewing documents, assessing whether a client has a case, dealing with phone calls or negotiations, and trying to resolve a case without having to go to court.

The eligibility thresholds for advice and assistance are a real barrier to access to justice, because they are particularly low. To be eligible, an applicant has to meet the thresholds for both disposable income and disposable capital. The disposable income threshold is £245 per week and the disposable capital one is £1,716. Those thresholds have remained the same since 2011, so they have been in place for around 14 years. Given the effects of inflation, those figures have decreased in real terms. To put that into context, the rules on income threshold say that, if someone has a disposable income of more than £245 per week, they will be ineligible. However, that is equivalent to the earnings of someone aged over 21 who works 20 hours per week in a minimum-wage job. That is the level of income that we are talking about.

The capital threshold is about one tenth of the equivalent threshold that applies to universal credit, which is £16,000. I do not think that it is too controversial to say that universal credit is not seen as the most generous social security payment in the world. Therefore, the rules can leave someone in an absurd situation whereby they are in receipt of universal credit but ineligible for advice and assistance, because they have savings or other capital of more than the threshold of around £1,700. They can be eligible for universal credit but ineligible for advice and assistance. Consequently, someone who is receiving universal credit is effectively expected to pay privately for legal advice.

The paper that SALC published last year proposed that the Scottish Government should increase the eligibility thresholds for advice and assistance and make them equivalent to those for civil legal aid. The civil legal aid thresholds are much more generous than those for advice and assistance in that they allow an applicant to have disposable income of around £26,000 per year and capital of around £13,000.

If the advice and assistance thresholds were increased to meet those for civil legal aid, a much larger proportion of the population would be eligible for advice and assistance. Again, the Scottish Government has the power to make that change in the regulations under section 36 of the Legal Aid (Scotland) Act 1986. That is another relatively simple thing that the Scottish Government could do to increase access to justice.

Professor Boyle: As the committee has heard from other witnesses, the bureaucracy in the system holds up the delivery of justice in the provision of an effective remedy and on the timeliness and affordability aspects. However, Ms Gosal's question relates to access more broadly. A lot of positive research tells us that, when dealing with issues such as potential financial or economic abuse, and with victims of domestic violence, there is a case for having automatic enrolment in a scheme that would support people without requiring them to take a means test if that would be problematic, as it would appear to be from the evidence of all the witnesses. The overall aim is to determine whether a person can demonstrate that they have the required funds.

Furthermore, as Dr Christman mentioned, the means test threshold is woefully low. I found Andy Sirel's evidence last week really helpful in considering the actual cost of taking a case. The idea that someone who has more than £1,400 in savings could take a case that costs £0.5 million and potentially pay the other side's costs, too, just does not work in practice. However, the issue is not just the role that the Scottish Legal Aid Board plays. It goes back to my initial point about this being quite a complex three-dimensional puzzle that needs to be solved, in which people play different roles.

As for what could be done immediately, there is really helpful advice on the idea of someone being able to open a case and have funding available automatically, rather than having to justify every single piece of evidence that is required—every phone call, every letter and every meeting.

Prior to the section 23 agreement under the Equality Act 2006 that was put in place in 2021, SLAB carried out roughly two equality impact assessments per year over a 10-year period. Since 2021, it has done, on average, 16 such assessments per year. Therefore, as I said, a learning process exists. Equality impact assessments do not necessarily gather the disaggregated data that we need to understand the cultural dimensions for various ethnic groups and the requirements of disabled people with certain needs, although existing guidance does say, for example, that if a person needs a trauma-informed approach, we might consider giving them more time for meetings.

However, we hear from practitioners that the double audit is not operating in that way. Solicitors go through an abatement process in which they have to argue over the nitty-gritty to justify every short call and the amount of time that is needed for a case. Because of the bureaucracy that the system involves, it has become very difficult to make legal aid business work in practice, so we do not have sufficient breadth of professional expertise—we do not have enough solicitors to carry out legal aid work.

Further, we do not even understand the depth of that problem. For example, as we heard in Fiona McPhail's evidence on evictions, 99 per cent of the landlords involved were represented and only 9 per cent of the tenants were. In 2022-23, 3,945 eviction cases came before the sheriff court, and, in the cases that SLAB supported, only 173 applicants received legal aid on eviction matters.

When we consider how cases play out in practice, some areas are well covered—SLAB could break down the information on those—but the group that Ms Gosal mentioned will face all the cross-cutting issues that we have discussed. People need somewhere safe to live, and they need to be able to feed their children and heat their homes. Those are everyday needs, and they are clustered and interconnected. However, we do not have the breadth of legal expertise to deal with them all, so legal aid, as a field of practice, needs massive investment. SLAB could do some of the work to make such practice more viable, but ultimately we need a law curriculum that meets those needs. The Law Society of Scotland does not include social welfare, environmental, human rights or equality law among the subjects that are compulsory for someone qualifying as a solicitor. Those subjects are covered under other areas, but they are not specialist subjects that we require law students to learn about.

If you want to qualify as a solicitor, you have to pay for a diploma in legal practice. If you go into private practice, those firms will often pay the fees for you, but legal aid firms cannot afford to pay for students to do diplomas. There is a complex puzzle of different things that people could do, but we need to increase our breadth of knowledge and expertise and make it viable for people to practise in those areas, so that we can start to address the challenges.

Practitioners tell us that they are constantly in crisis mode, as are the people they work with, who have to think about whether they have the time to speak to a solicitor, because they are dealing with a host of issues. Solicitors will also be making decisions about what cases they can take on. Hardly anything is happening with habitability cases involving issues such as damp and mould, because lawyers cannot take those cases on, and very few cases deal with the systemic issue of housing not being of a tolerable standard. All the focus is on one area, which is repeated for different social rights. It is about looking at the broader picture.

Pam Gosal: My next question is about bureaucracy and access. Dr Marsha Scott, who was on the previous panel, said that even the United Nations has raised the issue of the depletion of legal aid lawyers in Scotland. How can we talk about a human rights approach to administering legal aid when we have many layers of bureaucracy, as you have just mentioned; a lack of solicitors who are willing to take on cases at legal aid rates; women who are not eligible to access legal aid because they do not know their household incomes; and difficulties with understanding cultural and language differences, which we heard about from the previous panel?

Professor Boyle: The Scottish Legal Aid Board is on a learning journey in trying to embed equality and human rights. One of its reports mentions that legal aid is available in order to meet people's human and social rights, but there is a mismatch between the statutory body's remit and what is happening in practice for people on the ground, as well as how SLAB connects to other actors. More could be done by the Law Society of Scotland, for example, to encourage a broader curriculum, and the Government could do more to address the regulations, which create a chilling effect on addressing civil injustice, as Ben Christman mentioned.

If we think about access to justice as a journey from the perspective of the person who is experiencing the injustice, we see that there are many barriers along their route. Legal aid is one of the key aspects, but, ultimately, we cannot address all the issues with access to justice through legal aid alone. Typically, much of the research and focus on what we think are the required actions is about advice, representation and having a well-funded legal aid scheme, but we also need to think more broadly. I use the analogy of a mountain range. When people are about to embark on a journey to access justice, they see a huge mountain peak in front of them, because they do not have the financial resources and the costs involved are prohibitive. When they get to the top of that peak, they see that there are another five, six, seven or eight peaks in front of them that they could not see when they started their journey.

Thinking broadly about the journey to access justice, the first thing that people do not have is an awareness of their rights. People do not think about their legal needs as human rights, and many discrimination issues can arise in that context. They do not have the financial, emotional or legal resources that are required. We need investment in a broader group of specialist lawyers who are well funded to support people in such situations. We also need to think about their emotional resources, which goes back to the idea of placing the burden on individuals to try to fix systemic problems for everyone.

There is a fear of retribution, which closely connects to some of the issues that Pam Gosal raised in her question. We think that we are operating in a hypothetical situation: people should

be able to claim their rights, and legal advice and assistance and legal aid should be there to support them. However, when someone complains or makes it known in any way that they have a problem or an unmet need, there is often retribution, which manifests itself in many different ways. That is not necessarily built into the system—we have an adversarial system whereas other countries deal with stuff in more inquisitorial ways, to create a more people-centred approach. Retribution is a real fear and it does happen. We have evidence to demonstrate that.

11:30

We also have an incredibly complex system, in which people could take many different paths. For example, the Scottish Public Services Ombudsman has a 12-month time bar; however, there is a three-month time bar if you need to, or are required to, access an effective remedy by way of judicial review. However, people will not know that at the point at which they experience a human rights violation.

We have what is called “administrative mud” in the system. Solicitors talk about the idea that you just get lost in the system via appeals mechanisms and the bureaucracy. Effective and timely remedies are just not happening in practice, because people are mired in that administrative mud. Basically, the system is not designed to support human rights and meet people’s needs.

Then there are systemic issues, which goes back to regulation 15. It is important that we have compliance with the Aarhus convention, but environmental rights are closely connected to all the other issues that I mentioned—economic, social, cultural, environmental, civil and political aspects tend to be interconnected. That broader set of issues must be addressed in the context of regulation 15.

We need to think of ways to deliver collective justice mechanisms better and, ultimately, feed them back into the system. We do not have feedback loops to correct the problems, so we are seeing repeated decision errors in the system. Public bodies are not getting a chance to learn, to reframe the way in which decisions are made or to find out what is going wrong. That is really only the tip of the iceberg when between 50 and 70 per cent of decisions are found to be unlawful, which can happen only when people have had the resilience to get to that place and—through sheer luck, to be quite frank—managed to find a solicitor to help them.

It is about entirely recalibrating the system to take a human rights-based approach. There is much rich evidence to support that. In a sense, we are already well equipped to move into that way of thinking, but it is about changing the aims and objectives of an organisation, meeting needs and human rights, and addressing systemic collective injustice rather than simply focusing on audit, efficiency and saving money. Ultimately, if you start to address things more collectively, you make the system more efficient. It needs a bit of lateral thinking and consideration of the wider societal role that the system plays.

Pam Gosal: Thank you. That was some really good detail, Professor Boyle. Dr Christman, would you like to add anything?

Dr Christman: No, thank you.

The Convener: Are members content that they have asked everything that they wished to ask?

Members: Yes.

The Convener: Would the witnesses like to say anything that they have not said so far?

Professor Boyle: No, thank you.

Dr Christman: No, thank you.

The Convener: That brings our second panel to a close. Thank you, once again, for joining us this morning. We will now move into private session to discuss the remaining items on our agenda.

11:33

Meeting continued in private until 12:02.

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The deadline for corrections to this edition is:

Wednesday 25 June 2025

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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